No. 88-210

In the Supreme Court of the United States

OCTOBER TERM, 1988

IRA HENDERSON MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's convictions for perjury and obstruction of justice were tainted by the "spillover" effect of evidence offered in support of mail fraud charges that were dismissed by the court of appeals.

2. Whether the evidence was sufficient to support petitioner's perjury conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 836 F.2d 248.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1988. Petitions for rehearing were denied on March 7, 1988, and May 16, 1988.[1] The petition for a writ of certiorari was filed on July 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was con-

[1] Both petitioner and the government filed rehearing petitions.

victed on 11 counts of mail fraud, in violation of 18 U.S.C. 1341; one count of obstruction of justice, in violation of 18 U.S.C. 1503; and one count of making a false declaration before a federal grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent prison terms of five years on each count and was fined $5,000 on the obstruction of justice count. The court of appeals affirmed the convictions for obstruction of justice and perjury and reversed the convictions for mail fraud (Pet. App. 1a-18a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). It showed that in 1982 petitioner, then a judge of the Court of General Sessions in Memphis, Tennessee, engaged in a series of mailings to the Tennessee authorities designed to cause a bingo license to be issued for the H.D. Whalum Lodge No. 373. Petitioner provided documentation falsely stating that (1) the Lodge was tax exempt under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.); (2) no member of the sponsoring organization would receive profits from the bingo game; and (3) all persons conducting the bingo game had been members of the sponsoring organization for one year. The initial license application for the Lodge bore the signature "Charles Brooks," and petitioner notarized that signature. Although the Lodge was inactive, petitioner permitted Ronald Smith to use the Lodge license to operate a bingo game. In return, Smith paid petitioner $200 a week. Pet. App. 2a-3a.

Federal investigators subsequently questioned petitioner about his involvement in the operation of the Whalum Lodge bingo game. Petitioner denied any misconduct. The investigators thereafter located and interviewed Charles Brooks, who denied membership in the Lodge and denied the authenticity of his purported signature on the documents relating to the Lodge. Brooks also informed the in-

vestigators that petitioner had offered him $7,000 to help prevent the investigators and the grand jury from discovering petitioner's involvement in the bingo operation. Brooks agreed to tape-record his conversations with petitioner. In those recorded conversations petitioner again solicited Brooks' cooperation and promised to pay him $7,000 in return. Pet. App. 3a.

Subsequently, petitioner appeared before the federal grand jury. After being advised that he was a subject of the investigation, petitioner denied knowing that signatures on documents submitted in support of the Lodge bingo license were forgeries. Pet. App. 3a.

2. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-18a). The court first held (*id.* at 4a-12a) that the indictment failed to state the crime of mail fraud, as articulated in this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987). In any event, the court added (Pet. App. 12a-13a), the mail fraud convictions were improper because the instructions to the jury had impermissibly broadened the scope of the indictment. The court nevertheless affirmed the obstruction of justice and perjury convictions, rejecting petitioner's claim that those convictions were tainted by the "spillover" effect of the testimony advanced in support of the mail fraud charges (Pet. App. 14a-16a). The court explained (*id.* at 16a) that the "mail fraud charges constituted conceptually a totally separate type of crime from that of obstructing justice and perjury." The court also noted (*id.* at 15a) that even if the mail fraud counts had been severed from the remaining charges, "the evidence of [petitioner's] conduct which formed the basis of the mail fraud prosecutions would have been admissible under the provisions of Evidence Rule 404(b) to set in proper perspective the [petitioner's] conduct as it related to the obstruction and perjury charges." Finally, the court rejected (*id.* at 17a) peti-

tioner's claim that his answers to the grand jury were literally true and therefore could not support a perjury conviction.

ARGUMENT

1. Petitioner contends (Pet. 9-24) that his perjury and obstruction of justice convictions were tainted by the "spillover" effect of evidence relating to the invalid mail fraud counts. The court of appeals correctly rejected that claim. As the court explained (Pet. App. 16a), "the mail fraud charges constituted conceptually a totally separate type of crime from that of obstructing justice and perjury." There is accordingly no reason to doubt that the jury was able to segregate the evidence and apply it only to the charges to which it was relevant, as the trial court expressly instructed the jury to do (Tr. 1429). See, *e.g.*, *United States* v. *Alvarez*, 755 F.2d 830, 858-859 (11th Cir.), cert. denied, 474 U.S. 905 (1985); *United States* v. *Krevsky*, 741 F.2d 1090, 1094 (8th Cir. 1984); *United States* v. *Escalante*, 637 F.2d 1197, 1204 (9th Cir.), cert. denied, 449 U.S. 856 (1980). Moreover, even if the mail fraud charges had been severed from the perjury and obstruction of justice counts, as petitioner now urges, the evidence of petitioner's involvement in the fraudulent bingo scheme would have been admissible to establish petitioner's motive for committing perjury and obstructing justice. See *United States* v. *Lane*, 474 U.S. 438, 450 (1986).[2]

The court of appeals' decision is not in conflict with the decision of the Eleventh Circuit in *United States* v. *Stefan*, 784 F.2d 1093 (1986). In *Stefan*, the court stated (*id.* at

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[2] Petitioner suggests (Pet. 16-17) that the court of appeals refused to consider his "spillover" claim because he did not make a severance motion at trial. That is simply not so. The court of appeals reviewed that claim and rejected it on the merits (Pet. App. 14a-16a).

1101) that "important factors" in determining whether an invalid RICO count tainted convictions on other counts are: "(1) [w]hether the jury meticulously sifted the evidence; and (2) whether the appellant was prejudiced by a spill over of evidence relating to [the] other counts * * *." The court explained (*ibid.*) that the jury's decision to return a split verdict in the case demonstrated that it had "meticulously sifted" the evidence. The court did not hold, however, that a finding of no prejudicial spillover may be made *only* in cases where a split verdict has been returned. There is no reason to suppose that on the present record the Eleventh Circuit would reach a different result from the one reached by the court below.[3]

2. Petitioner contends (Pet. 24-25) that the evidence was insufficient to support his perjury conviction because his testimony before the grand jury was literally true. The grand jury testimony in question was as follows (Pet. App. 23a-24a):

Q. Was Mr. Smith a member of the H. D. Whalum Lodge?
A. Who is that; Ronnie Smith?
Q. Yeah.
A. No, sir.
Q. Was he supposed to be a member in order to run the bingo?
A. I would have to—the statute speaks for itself on that, Mr. Ewing.
Q. I think you know what the statute provides.
A. I wouldn't be so sure about that.
Q. Did you have anything to do with making out membership cards for anybody?

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[3] The cases cited by petitioner (Pet. 14-16) turn on their individual facts and do not involve a different legal standard for deciding whether there has been prejudicial spillover.

A. The membership applications, other than securing them, but that was about all. No, I didn't have anything specifically to do with the cards per se.

Q. Well, let me show you one of these little yellow cards that says the H.D. Whalum Lodge Auxiliary Committee, have you ever seen one of those?

(Thereupon, the above-described [sic] card was passed to the witness.)

A. No, sir.

Q. You have never seen one of those cards?

A. I don't have any recollection of ever seeing one. It shocks me when I see that.

Q. Do you know Charles Brooks?

A. Yes, sir.

Q. Do you know whether he signed those cards?

A. I wouldn't know.

Q. Mr. Murphy, do you have any knowledge [whether] any signatures on any documents submitted to the State are forgeries?

A. Not to my knowledge. I am standing behind my privilege, but not to my knowledge have I known of any signatures that were forgeries.

Q. You say that you are standing behind your privilege.

A. Yes, sir. I don't know of any forged signatures being submitted to the State.

The government's evidence showed that petitioner's testimony was false. Charles Brooks testified at trial that he had never signed the yellow membership cards, nor had he given petitioner permission to sign the cards for him (Gov't C.A. Br. 45). Moreover, a handwriting expert identified the signature on the cards as petitioner's (*ibid.*). From that evidence, the jury was entitled to conclude that petitioner had lied to the grand jury when he testified that

he had never seen the cards, that he did not know whether Brooks had signed the cards, and that he did not know whether any signature on the cards had been forged.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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